No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1949

THOMAS [illegible]

v.

NA[illegible]

ON PETITION [illegible]
STATES [illegible]
DIRECT

BRIEF FOR [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 201

TROJAN POWDER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 92–97) is reported in 135 F. (2d) 337. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 5–27) are reported in 41 N. L. R. B. 1308.

JURISDICTION

The decree of the court below (R. 97–98) was entered on April 27, 1943. The petition for a writ of certiorari was filed on July 26, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below, that petitioner by oral antiunion statements of its supervisors and by a series of letters to its employees which threatened a curtailment of work in the event of continued union activity, interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act.

2. Whether petitioner is privileged by virtue of the First Amendment thus to interfere with, restrain, and coerce its employees in the exercise of their right to self-organization.

3. Whether the order of the Board which required petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their right to self-organization was sufficiently definite to be valid.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* p. 17.)

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 5–7), the Board issued its findings of

fact, conclusions of law, and order (R. 5–27). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

In August 1936 the American Federation of Labor attempted to organize the employees of petitioner's Seiple, Pennsylvania, plant who theretofore had been unorganized (R. 8; 38, 43–44). Petitioner, by means of both written and oral threats, coerced its employees to abandon their organizational efforts (R. 8–11; 37–38, 43–46, 54–63). It sent a series of letters to its employees which stressed the necessity for their loyalty; spoke of petitioner's plans to increase the earnings of its "loyal" employees; pointed out that "internal dissension and bickering" would diminish petitioner's efforts in this direction; and questioned whether it would be "practicable" for petitioner to embark upon its program "unless it is assured of the full cooperation of its employees" (R. 8; 37–38, 43–44, 54–59). Near the end of this series of letters petitioner solicited its employees to execute individual pledges not to participate in "any labor disturbance of any sort" (R. 8–9; 60–61). At the same time Boyd, petitioner's assistant director of research, attempted to dissuade an employee who was an officer in the A. F. of L. from his union activities, intimating that he would be discharged if he persisted in them (R. 10; 43–

[1] In the following statement the citation preceding the semicolon refers to the Board's findings; those following refer to the supporting evidence.

46). As a result of petitioner's coercion "practically all" of the employees signed the pledge as requested, and petitioner thus succeeded in eliminating all union activity in its plant for five years (R. 9, 11, 17; 43, 62).

In the latter part of 1940 or early 1941 the C. I. O. appeared, conducted an organizational campaign, and on April 8, 1941, asked petitioner to recognize it as the employees' bargaining agent (R. 11–12; 30–33). Petitioner replied to this request by issuing to its employees a second series of letters, "strikingly similar to the 1936 series" (R. 12; 38, 64–71). The opening letter of this series was sent to the employees on April 8, the very day on which the C. I. O. first sought recognition (R. 12; 38, 64–65). In this letter, petitioner warned its employees that "only the employer * * * can supply jobs. * * * For anyone but an employer to claim that he can provide jobs or job security is nonsense"; stressed that "no one need join any organization of any sort in order to have a job or enjoy security with us"; and asserted that "those who may say anything to the contrary are really advocating job insecurity" (R. 12–13; 64–65).[2]

[2] The letter also announced an immediate increase in employee bonuses and contained other suggestive statements, as, for example, "your future security rests chiefly in your own hands because the loyalty of the Company to you will always at least equal your loyalty to the Company and it is the Company which * * * provides the jobs" (R. 65).

On April 9th and 10th petitioner distributed to the employees letters offering, as inducements for their "full cooperation," job security and increased compensation and warning them that any course other than "carrying on with confidence under the tried and experienced management" which had brought about their present benefits "could endanger the very existence of the business" (R. 12–13; 66–68). On April 14, the day before a meeting scheduled with the C. I. O. representative to discuss the request for collective bargaining, petitioner sent to each of its employees an individual letter promising steady work, announcing a bonus increase and setting forth the minimum sum to which the particular bonus of the employee addressed would amount, the figures varying in each of the letters (R. 14–15; 69–71). Attached to the letters was the following form which each employee was asked to sign and return (R. 14–15; 69–71):

> In consideration of the above, I hereby state that during the period ending December 31, 1941, I intend to work steadily without interruption except (sic) for absences for such things as sickness and the like. I realize that the statements which have been made by the Company to me depend for their fulfilment upon the carring (sic) out of my intention to work without interuption (sic) as stated above.

The petitioner made certain that these individual no-strike pledges would be signed by warn-

ing the employees in its covering letter that their response to the pledges would determine what work petitioner would seek and undertake, and indicating that a failure to sign the pledges might thus deprive them of continued work, since it would be "impracticable" for petitioner to commit itself to do important and necessary work if there were any possibility whatever of interruption of operations at the plant (R. 14–15; 69–71).

The statements in the letters were amplified by the contemporaneous statements of petitioner's supervisory employees. General Foreman Koch called employees from their work, directed their attention to the April 8th letter, which he said they would receive that night, reiterated its statement that they need not join a labor organization to work for petitioner, and cautioned them against being coerced into joining the C. I. O. by statements that it would cost them more to do so later (R. 15–16; 44, 47–48). Likewise Plant Superintendent Bronstein called one employee's attention to the April 14th letter, stressed its assurance that the employees did not have to join an organization to have job security, and asked him if he had attended union meetings (R. 16; 50–51). Assistant Research Director Boyd repeated to groups of employees the letters' warning that petitioner expected its loyalty to them to be returned (R. 16; 43, 48–49). Foreman Forgan told some of the employees that "all the C. I. O. leaders" were

"sabotagers" trying to bring about the loss of the war by obtaining control of defense plants for the purpose of calling strikes (R. 16; 43, 49–50).

On April 25th, although the C. I. O. had meanwhile protested the April 14th letter, petitioner again wrote its employees and thanked them for their "substantially unanimous" response in signing the individual pledges (R. 16–17; 35–37, 72).

Because the complaint alleged only the conduct of petitioner in 1941 as unfair labor practices and evidence respecting the incidents in 1936 was introduced solely as background, the Board used its findings respecting the 1936 conduct solely as an aid to judging the intent and effects of the 1941 conduct. With respect to the latter, the Board concluded (1) that petitioner, by appealing to the loyalty of its employees, emphasizing the benefits which it granted them unilaterally, and indicating that security and wage increases depended upon its good will, intended to and did discourage union membership; (2) that it impliedly threatened the employees that their persistence in union or concerted activities might result in a curtailment of work at the plant; (3) that by exacting an assurance from each employee that he would not engage in any work stoppage in exchange for steady employment and increased wages, petitioner imposed a limitation upon the right to engage in concerted activities which, in effect, compelled a choice between continued work and union membership; and

(4) that, in view of all the circumstances surrounding petitioner's course of antiunion conduct, as evidenced by the letters and statements, such conduct constituted interference, restraint and coercion within the meaning of the Act. (R. 18–19).[3] Upon these findings, the Board ordered petitioner to cease and desist from its unfair labor practices (R. 24–25).

On November 6, 1942, the Board petitioned the court below for enforcement of its order (R. 72–74) and on April 6, 1943, the court handed down its unanimous opinion enforcing the Board's order without modification (R. 92–97). On April 27, 1943, a decree was entered in conformity with the opinion (R. 97–98).

ARGUMENT

1. Petitioner's contention (Pet. 5–7, 10–11) that the Board's findings that petitioner interfered with, restrained, and coerced its employees, are not supported by substantial evidence, presents no question of general importance. The Board found, and the court below upheld the finding, that the letters sent to the employees and the statements made to them by supervisory employees in 1941 were intended to constitute, and

[3] Although the complaint alleged that petitioner had refused to bargain in violation of Section 8 (5), the Board found that the Union had not been designated by a majority of the employees in the appropriate unit at the time of the alleged refusal and accordingly dismissed the complaint with respect to this allegation (R. 19–23).

were understood by the employees to constitute, threats of economic reprisal if union activities continued (R. 18, 95–96). Petitioner's repeated suggestions to its employees that security of employment, wage increases, and continued work depended upon the petitioner's good will and that its good will would be alienated by concerted activity (*supra*, pp. 4–5) could not be construed in any other manner than as implied threats. The fact that these threats were not explicit but rather appeared in veiled form does not, as petitioner assumes (Pet. 9–10), reduce them to mere influence. Threats of an employer that he will treat his employees less advantageously if they engage in organizational activities than he would otherwise treat them, violate the Act regardless of the form in which they are conveyed. No court has ever questioned this. And the courts have uniformly upheld the Board in finding threats implicit in the sort of statements made in the instant case.

Indeed, the phrases in which petitioner couched its utterances recur frequently in antiunion drives and have often been the subject of notice by the courts. Thus, appeals to employees for their "loyalty" and "cooperation" issued at the opening of a union organizational campaign, such as those in the letters of April 9th and 10th and the statement of Supervisor Boyd (*supra*, p. 16), have been held to constitute interference, restraint, and coercion in violation of Section 8

(1).[4] Similarly, statements such as petitioner's suggestion that the employees' failure to grant this "cooperation" by abandoning collective activity "could endanger the very existence of the business" (*supra*, p. 5),[5] and the gratuitous assurance that it was unnecessary to join a union to hold a job, contained in the April 8th letter and emphasized by petitioner's supervisors Koch and Bronstein (*supra*, pp. 4, 6),[6] have frequently been held coercive interference by an employer. This

[4] *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 955 (C. C. A. 2); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 474 (C. C. A. 3); *National Labor Relations Board* v. *Clarksburg Pub. Co.*, 120 F. (2d) 976, 978–979 (C. C. A. 4); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7).

[5] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 76; *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 67 (C. C. A. 2); *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. (2d) 1020 (C. C. A. 6); *Hobart Cabinet Co.* v. *National Labor Relations Board*, decided May 8, 1942 (C. C. A. 6), certiorari denied, 314 U. S. 679; *National Labor Relations Board* v. *W. A. Jones Foundry Co.*, 123 F. (2d) 552, 553 (C. C. A. 7).

[6] *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625, 628 (C. C. A. 2); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309 (C. C. A. 7); *National Labor Relations Board* v. *Goshen Rubber & Mfg. Co.*, 110 F. (2d) 432, 434 (C. C. A. 7); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78 (C. C. A. 9), certiorari denied, 310 U. S. 632.

is also true of petitioner's unilateral offers of job security and increased compensation which appear throughout the whole series of letters (*supra*, pp. 4–5).[7] The effort to abstract from the employees individual no-strike pledges (*supra*, pp. 5–6) at a time when their collective representative was seeking to use such an agreement as a bargaining factor (Tr. 55, Bd. Exh. 4) also constitutes the very type of conduct proscribed by the Act.[8] Foreman Forgan's verbal assault upon the C. I. O.'s leaders as saboteurs (*supra*, pp. 6–7) exemplifies the practice by antiunion employers of characterizing unions and their officers as subversive.[9]

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[7] *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 35–36 (C. C. A. 3); *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. (2d) 180, 184 (C. C. A. 4); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 861 (C. C. A. 7).

[8] *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 353; *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 885–888 (C. C. A. 7); *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 753–755 (C. C. A. 7), certiorari denied, 317 U. S. 649.

[9] *North Carolina Finishing Company* v. *National Labor Relations Board*, 133 F. (2d) 714, 716 (C. C. A. 4); *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 489 (C. C. A. 3), certiorari denied, 315 U. S. 797; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. (2d) 311, 314 (C. C. A. 7); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 456 (C. C. A. 7), certiorari denied, 317 U. S. 650.

The Board's finding that the 1941 statements were coercive in character is likewise supported by the evidence that in 1936 petitioner used a substantially similar series of letters and supervisory statements to frustrate the A. F. of L.'s organizational attempt (*supra*, p. 3). In both instances petitioner appealed to the loyalty of its workers, offered them inducements for such loyalty, threatened them with reduced employment if they failed to display it, and secured individual signed assurances against concerted action. The Board's ultimate findings were based only upon petitioner's 1941 activities (R. 11), but it properly took into consideration the resemblance between its original means of meeting employee organization and the conduct which followed the C. I. O.'s appearance.[10] Thus there was an abundance of evidence before the Board when it concluded that "in view of all the circumstances surrounding [petitioner's] course of antiunion conduct as evidenced by the letters and statements * * * such conduct constituted interference, restraint, and coercion within the meaning of the Act" (R. 19).

2. Petitioner's contention (Pet. 4, 7, 12) that this case involves the issue of free speech under the First Amendment is, we submit, without merit. The facts set forth (*supra*, pp. 3–7) show that the Board was fully justified in concluding

[10] *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 274; *National Labor Relations Board* v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 379 (C. C. A. 2); also cases cited *infra*, p. 14, n. 14).

that petitioner's whole course of conduct constituted interference, restraint, and coercion. Such conduct is not constitutionally privileged merely because it involves the use of oral or written statements. As this Court has said, "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act." *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477.[11] Here the Board was clearly justified in finding that, in view of the inequality of the bargaining powers of the parties,[12] the timing of the individual appeals whereby petitioner admittedly sought to "influence" its employees (Pet. 9),[13] and the pattern established

[11] See also *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3). Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2); *National Labor Relations Board* v. *M. A. Hanna Co.*, 125 F. (2d) 786, 790 (C. C. A. 6; *National Labor Relations Board* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007–1008 (C. C. A. 9).

[12] "The position of the employer * * * carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." *National Labor Relations Board* v. *Falk Corp.*, 102 F. (2d) 383, 389 (C. C. A. 7); see also *Federbush* case, *supra*, note 11, pp. 956–957; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3).

[13] *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 65–66 (C. C. A. 2); *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), certiorari denied, 317 U. S. 649.

by its prior use of the same device,[14] the conduct of the employer amounted to coercion. Thus, the Board's order may fairly be said to be based on the totality of petitioner's activities during the period in question in the light of which its statements plainly became coercive. See *Virginia Electric & Power* case, 314 U. S. at pp. 476 and 479. Accordingly these acts, "considered not in isolation but as part of a pattern," do not involve a question of free speech under the First Amendment. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* decided June 7, 1943, No. 709, last Term, pamphlet, p. 5.

Under like circumstances the courts have consistently held, as did the court below, that no issue of free speech is raised. See *National Labor Relations Board* v. *M. A. Hanna Co.,* 125 F. (2d) 786, 790 (C. C. A. 6); *National Labor Relations Board* v. *Stone,* 125 F. (2d) 752, 755–756 (C. C. A. 7), certiorari denied, 317 U. S. 649; *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.,* 133 F. (2d) 856, 860–861 (C. C. A. 7); *Gamble-Robinson Co.* v. *National Labor Relations Board,* 129 F. (2d) 588, 591 (C. C. A. 8). Similar contentions by employers in many recent petitions for certiorari have been rejected.[15]

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[14] *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588; *National Labor Relations Board* v. *National Seal Corp.,* 127 F. (2d) 776, 778 (C. C. A. 2); *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. (2d) 61, 68 (C. C. A. 2).

[15] *National Labor Relations Board* v. *Bank of America,* 130 F. (2d) 624 (C. C. A. 9), certiorari denied, 318 U. S. 791,

The decision below does not involve a conflict with *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), petition for certiorari pending, No. 334, present Term. The presence of testimony respecting labor relations at petitioner's plant for a period of more than five years, the testimony of numerous witnesses respecting speeches, statements, and inquiries of various supervisory employees, as well as the documentary evidence of letter after letter containing only slightly veiled threats, afforded a more extensive record of employer interference than in the *American Tube Bending* case, which turns on a pre-election letter and speech of the company's president. We believe that decision to be erroneous and regard it as of large importance; but we cannot conclude that the Circuit Court of Appeals for the Second Circuit would have felt bound to decide the present case in the same way.

3. Petitioner contends that the Board's order is improper since an employer is entitled "to know from exactly what acts he is restrained" (Pet. 4).

792; *North Electric Mfg. Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818; *Norristown Box Co.* v. *National Labor Relations Board*, 124 F. (2d) 429 (C. C. A. 3), certiorari denied, 316 U. S. 667; *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *American Manufacturing Co. of Texas*, 132 F. (2d) 740 (C. C. A. 5), certiorari denied, No. 852, last Term.

What Congress meant by "interference" and "coercion" is clear and these terms refer to "well understood concepts of the law." *Texas and N. O. Railroad Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 568. It is well settled that an employer who has been found to have violated Section 8 (1) of the Act by interfering with, restraining or coercing its employees may properly be ordered to cease and desist therefrom. *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426; *Ford Motor Co.* v. *National Labor Relations Board,* 114 F. (2d) 905, 916 (C. C. A. 6), certiorari denied, 312 U. S. 689; *National Labor Relations Board* v. *Swift & Company,* 108 F. (2d) 988, 990 (C. C. A. 7); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.,* 133 F .(2d) 856, 861–862 (C. C. A. 7).

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1943.